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### Section 1983 Civil Rights Litigation Colloquium

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## § 1983 CIVIL RIGHTS LITIGATION COLLOQUIUM

*Professor Erwin Chemerinsky*<sup>1</sup>  
*Professor Martin A. Schwartz*<sup>2</sup>

PROFESSOR SCHWARTZ: We have grouped the October 2002 Supreme Court term § 1983 cases into five categories. Let me just run through them so you know where we are heading. We are going to start with supplemental jurisdiction and the *Jinks*<sup>3</sup> decision, move to coercive interrogation in *Chavez*,<sup>4</sup> then the two Megan's Law decisions,<sup>5</sup> one prisoners' rights case,<sup>6</sup> and punitive

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<sup>1</sup> Professor Erwin Chemerinsky is a former Sydney M. Irmas Professor of Law and Political Science, University of Southern California Law School. He is presently a faculty member of Duke Law School where he is an Alston & Bird Professor of Law. Professor Chemerinsky is a renowned federal constitutional law scholar and has published extensively in the area of constitutional law. This article is based on a transcript of remarks given at the Practicing Law Institute's 20th Annual Program on § 1983 Civil Rights Litigation.

<sup>2</sup> Professor Martin A. Schwartz is highly accomplished in the field of § 1983 litigation and, among other things authored a leading treatise entitled Section 1983 Litigation: Claims and Defenses (3d ed. 1997), Section 1983 Litigation: Federal Evidence (3d ed. 1999) and with Judge George C. Pratt, Section 1983 Litigation: Jury Instructions (1999). In addition, Professor Schwartz is the author of a bi-monthly column in the New York Law Journal, entitled "Public Interest Law." Professor Schwartz has also been the co-chair of the Practicing Law Institute annual program on § 1983 litigation for over twenty years, and is co-chair of its Supreme Court Review Program.

<sup>3</sup> *Jinks v. Richland County*, 538 U.S. 456 (2003).

<sup>4</sup> *Chavez v. Martinez*, 538 U.S. 760 (2003).

<sup>5</sup> *Smith v. Doe*, 538 U.S. 84 (2003); *Conn. Dep't. of Pub. Safety v. Doe*, 538 U.S. 1 (2003).

<sup>6</sup> *Overton v. Bazzetta*, 539 U.S. 126 (2003).

damages.<sup>7</sup> After that, we will spend some time talking about the pending cases on the current Supreme Court docket.

Supplemental jurisdiction is important because in a large number of § 1983 complaints, the plaintiff attempts to assert one or more state law claims along with the § 1983 constitutional claim under the supplemental jurisdiction statute. Section 1367 of Title 28 largely codifies the prior common law doctrine of pendent jurisdiction.<sup>8</sup> Professor Chemerinsky, if you might just spend a couple of minutes reviewing how that works.

PROFESSOR CHEMERINSKY: If I can take you back to those pleasant days as first year law students in civil procedure, you remember learning then about ancillary and pendent jurisdiction, which were judicially created doctrines to allow federal courts to hear claims over which they otherwise would not have jurisdiction. In 1990, for the first time, Congress codified those judicially created doctrines in a statute, 28 U.S.C. § 1367. The Court simplified the vocabulary. No longer are we talking about pendent and ancillary jurisdiction; instead, it is all called “supplemental jurisdiction.” Essentially, Congress took the judicially crafted doctrines and made them statutory, saying that

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<sup>7</sup> *State Farm v. Campbell*, 538 U.S. 408 (2003); *Romo v. Ford Motor Co.*, 122 Cal. Rptr. 2d 139 (Cal. Ct. App. 2002), *cert. granted, vacated by* 538 U.S. 1028 (2003); *Wei Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003).

<sup>8</sup> 28 U.S.C. § 1367 (2004).

federal courts can hear claims against parties they otherwise would not have jurisdiction over, as long as they come from the common nucleus of operative fact, the same facts that are properly before the Court.<sup>9</sup> One part of that statute, 1367(d) says, if there are state law claims properly before the federal court, the statute of limitations is tolled on those claims while the case is pending in federal court.<sup>10</sup> This is important because there are many circumstances under which the federal court will not exercise supplemental jurisdiction. Section 1367 outlines what those might be.

In the *Jinks* case Professor Schwartz refers to, that is exactly what happened: an individual files a lawsuit in federal court with both federal and state law claims; the federal court ends up dismissing the federal law claims leaving only state law claims.<sup>11</sup> The federal court exercises its discretion to not hear the state law claims and allow those to be refiled in state court.<sup>12</sup> But for 28 United States Code 1367(d), those claims would be time barred in state court because the statute of limitations had expired.

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<sup>9</sup> *Id.*

<sup>10</sup> *See, e.g.,* Raygor v. Regents of the Univ. of Minn., 534 U.S. 533 (2002).

<sup>11</sup> *Jinks*, 538 U.S. at 460. Plaintiff asserted a federal law cause of action under 42 U.S.C. § 1983. She also filed supplemental survivor and wrongful death claims under South Carolina state law. Summary judgment was granted for defendant on the federal claim, leaving only state-law claims for adjudication.

<sup>12</sup> *Id.*

Section 1367(d) says that as long as the claims are refiled in state court within 30 days after their dismissal from federal court, the statute of limitations is not expired. The issue in the *Jinks* case is whether 1367(d) is unconstitutional. A South Carolina appellate court ruled it unconstitutional, saying that Congress had no authority to tell state courts what statute of limitations rules applied in state law claims.<sup>13</sup> The Supreme Court unanimously reversed.<sup>14</sup>

PROFESSOR SCHWARTZ: The state law claim in *Jinks* is a claim against a municipality, and the municipality's argument raised three issues. One was a textual argument that maybe Congress did not intend this tolling rule to apply to claims against municipalities.<sup>15</sup> Second, there was a question whether Congress had the constitutional authority to adopt this tolling rule.<sup>16</sup> The third question, which to me was the intriguing question Professor Chereminsky just alluded to, was what we might call the federalism question: Does the Congress have the power on a state law claim against the municipality to tell a state court what the statute of limitations rule should be?<sup>17</sup> I was concerned about this

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<sup>13</sup> *Jinks v. Richland County*, 563 S.E.2d 104, 106 (S.C.), *cert. granted*, 537 U.S. 972 (2002).

<sup>14</sup> *Jinks*, 538 U.S. at 467.

<sup>15</sup> *Id.* at 465-66.

<sup>16</sup> *Id.* at 464.

<sup>17</sup> *Id.* at 461-62.

case when it was headed to the United States Supreme Court because I wondered whether the next federalism issue that the Supreme Court might take up was protection of municipalities, which we have not seen yet. Up to now, it has just been protection of states, but this is a claim against a municipality and asserted in a state court. I was concerned whether that was going to be the next on what some might call the federalism hit list in the Supreme Court.

PROFESSOR CHEMERINSKY: I think there is basis for that concern. The year before, in a case called *Raygor v. University of Minnesota*, the Supreme Court said this statute, § 1367(d), does not apply when there are supplemental state law claims against a state government.<sup>18</sup> In an opinion by Justice O'Connor, the Supreme Court said *Raygor* raises important federalism and sovereign immunity concerns to allow this to apply to state governments;<sup>19</sup> they concluded that 1367(d) did not apply in that context.<sup>20</sup> There was reason to believe that the Supreme Court might extend that to local governments or even find 1367 deemed more generally unconstitutional, but the Supreme Court continues

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<sup>18</sup> 534 U.S. at 548 (holding that § 1367(d) does not toll the period of limitations for state law claims against state defendants).

<sup>19</sup> *Id.* at 540. The court stated that given the principles of state sovereign immunity, § 1367(d) raises serious doubts as to the provisions' applicability to state law claims against non-consenting states. *Id.* at 541.

<sup>20</sup> *Id.*

to adhere to the distinction it always followed between state government, which enjoy sovereign immunity and local governments, which are not protected.<sup>21</sup>

There is another important issue here that I thought the Court might address, and that is the meaning of the necessary and proper clause.<sup>22</sup> We have seen the Supreme Court narrow Section 5 of the Fourteenth Amendment.<sup>23</sup> The argument made to the Supreme Court for the constitutionality of 1367(d) was that it was an exercise of Congress's authority under the necessary and proper clause.<sup>24</sup> Justice Scalia bought that argument; he said Congress has the authority to create federal courts so Congress has the authority under the necessary and proper clause to preserve the attractiveness of the federal courts.<sup>25</sup> Justice Scalia said that if the effect of 1367(d) being unconstitutional would be that people who wanted to bring both federal and state claims would always have to go to state court to preserve the statute of limitations, it would undermine the attractiveness of the federal forum.<sup>26</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>23</sup> *See City of Boerne v. Flores*, 521 U.S. 507 (1997). *See* U.S. CONST. amend. XIV, § 5, which states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

<sup>24</sup> *Jinks*, 538 U.S. at 462.

<sup>25</sup> *Id.* at 464 ("We are also persuaded . . . [of] the power of Congress to establish the lower federal courts and provide for the fair and efficient exercise of their Article III powers.").

<sup>26</sup> *Id.* at 463-64.

I might add here that there is a case this term in the Court called *Sabri v. United States*<sup>27</sup> which goes directly to the meaning of the necessary and proper clause. It involves a federal statute that makes it a federal crime to bribe state or local government officials or their agents even if the officials and agents have no relationship to programs that are receiving federal assistance.<sup>28</sup> The specific issue the Supreme Court granted certiorari on is whether that statute falls within the scope of the necessary and proper clause. *Jinks* does not narrow the necessary and proper clause, but the issue is still there.

PROFESSOR SCHWARTZ: If you put the *Raygor* case together with the *Jinks* case, what I think you come up with is that if there is a supplemental state law claim filed in federal court against a state agency, the plaintiff does not get the benefit of the 1367(d) tolling rule. Therefore, the plaintiff runs some risk that the statute of limitations might run out because state law claims for monetary or prospective relief against a state entity are very likely to be dismissed on Eleventh Amendment grounds.<sup>29</sup> So

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<sup>27</sup> *United States v. Sabri*, 326 F.3d 937 (8th Cir.), *cert. granted*, 540 U.S. 944 (2003). Subsequent to this conference, the Court held that the statute was a constitutional exercise of congressional power under the necessary and proper clause. *Sabri v. United States*, 541 U.S. 600 (2004).

<sup>28</sup> *Sabri*, 326 F.3d at 939.

<sup>29</sup> U.S. CONST. amend. XI provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *See, e.g., Edelman v. Jordan*, 415



when you ask whether the claim can be refiled in state court, the state statute of limitations might run and the plaintiff is out of luck. If you take the same state law claim and assert it against a municipality, the plaintiff gets the benefit of the 1367(d) tolling rule.<sup>30</sup> That is because of the distinction that Professor Chemerinsky says the Court draws between interests under the federal constitution of state government as compared to interests under the federal constitution of municipal government.

There is this line drawn: the Eleventh Amendment protects states and state entities, but it does not protect municipalities. I wonder, in terms of broader federalism concerns, how much logic there is to all of this when ultimately you ask the question, who created these municipalities? The states did. The municipalities are the creatures of the states. Does the Court's distinction between municipalities and states make sense to you?

PROFESSOR CHEMERINSKY: I do not think it makes sense in terms of logic. It does make sense in terms of history though. In 1890, in a case called *Lincoln County v. Luning*, the Supreme Court said local government entities are not protected by

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U.S. 651, 673 (1974) (holding that constructive consent is not a doctrine commonly associated with the waiver of constitutional rights and protection under the 11th Amendment will only be waived where stated by the most express language).

<sup>30</sup> 28 U.S.C. § 1367(d) (2004).

sovereign immunity.<sup>31</sup> The Supreme Court has constantly adhered to that distinction.<sup>32</sup> At least at this point there are no Justices saying we should go back and rethink that distinction.

If I can just conclude this little piece of our discussion by drawing a practical line for you as lawyers: 1367(d) applies against all defendants except state governments.<sup>33</sup> If you are a plaintiff's lawyer and you are suing a state government with pendent state law claims, then you have to remember 1367(d) does not apply. Then you have hard choices. You can file your federal and state claims in state court but you must file before the statute of limitations expires under state law claims. If you want to preserve the state law claims, you have to file them in state court knowing, of course, that if the state court decides the state law claims, that will raise res judicata claim preclusion back in federal court.<sup>34</sup> If you want to preserve both, you may have to think about filing both in state court and foregoing the federal forum entirely. I think that is the practical implication of these decisions.

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<sup>31</sup> 133 U.S. 529, 530 (1890) ("The Eleventh Amendment limits the jurisdiction only as to suits against a State.").

<sup>32</sup> See, e.g., *Bd. of Trustees v. Garrett*, 531 U.S. 356, 369 (2001) (noting that the Eleventh Amendment does not extend to local government entities).

<sup>33</sup> *Jinks*, 538 U.S. at 466.

<sup>34</sup> See e.g., *Gargallo v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 918 F.2d 658, 662 (6th Cir. 1990) (finding that had the complaint been filed in district court, Ohio's claim preclusion law would bar the plaintiff's claim, absent any regard for subject matter jurisdiction).

JUDGE PRATT: I have a question. Some states, New York being one, have their own preservation statutes.<sup>35</sup> The New York statute says that if a case is dismissed on jurisdictional grounds and not on the merits, you have six months to file again.<sup>36</sup> So 1367(d) really has no application in New York. I wonder how many other states have similar statutes, because it seems to be a very fair doctrine.

PROFESSOR SCHWARTZ: I think the problem is that on claims against municipalities, you might have a state with a short statute of limitations, like these ninety-day rules. You might not have a savings provision like New York, which is what happened in *Jinks*. The claim in *Jinks* was subject to dismissal under the statute of limitations but for subdivision (d) of 1367, so it can be an issue.

Some of the supplemental jurisdiction issues in § 1983 actions that may be more pragmatically important in the litigation may not be as exciting as *Jinks*. I came across a case a few weeks back, *Hudson v. Coleman*, that raised a different supplemental jurisdiction issue.<sup>37</sup> I want to mention the issue

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<sup>35</sup> N.Y. C.P.L.R. § 205 (McKinney 2004).

<sup>36</sup> *Id.*

<sup>37</sup> 347 F.3d 138, 146 (6th Cir. 2003) (holding that the issues to be litigated under an indemnity agreement deprived the court of ancillary jurisdiction).

because there is now a split in the circuits on this.<sup>38</sup> The issue comes up this way: say the plaintiff recovers a judgment in damages against a state or local official in the official's personal capacity. In this case, it was actually a consent judgment for money damages.<sup>39</sup> The city, which was a party to the action, was dismissed early on, but this issue can come up in a case in which the city was never a party. The plaintiff is having difficulty recovering the judgment, so the plaintiff says, well, there is this indemnification provision, maybe it is in a statute or some type of an agreement between the city and its police officers. What if the plaintiff tries to enforce the indemnification obligation against the municipality in order to collect the judgment? There is a Seventh Circuit case, *Yang v. City of Chicago*, that says that enforcement power comes with supplemental jurisdiction under what previously would have been called ancillary jurisdiction.<sup>40</sup> The Sixth Circuit disagreed in *Hudson v. Coleman* because the supplemental indemnification claim raises new issues.<sup>41</sup> Whether the employee acted within the scope of his employment was not an issue in the § 1983 case. I could see that issue headed toward

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<sup>38</sup> See *id.*; cf. *Yang v. City of Chicago*, 137 F.3d 522, 525 (7th Cir. 1998) (holding garnishment proceeding to be an ancillary part of the original § 1983 claim over which the federal court properly had jurisdiction).

<sup>39</sup> *Hudson*, 347 F.3d at 140.

<sup>40</sup> 137 F.3d at 525.

<sup>41</sup> 347 F.3d at 146 (reasoning that the court needs the benefit of fact-finding and briefing before deciding the legitimate scope of employment questions).

the Supreme Court with a split in the circuits. Do you have any reaction to that?

PROFESSOR CHEMERINSKY: It really goes again to first year civil procedure; how do you define the common nucleus of the operative fact?<sup>42</sup> In one sense, it is within the common nucleus of operative fact. It was one incident of a constitutional violation that gave rise to the 1983 suit, and these are different legal claims arising from the same violation. On the other hand, there are factual differences between the issues. Obviously, one goes to whether it was a constitutional violation and the other goes to the scope of the indemnification clause. My answer would be more like the Seventh Circuit. I think the goal of supplemental jurisdiction is to try to get all of the claims, all of the parties from one transaction or occurrence, one common nucleus of operative fact litigated together for the sake of efficiency. I think these are different legal issues coming from the same events.

PROFESSOR SCHWARTZ: Let us move to *Chavez v. Martinez*, which broadly raised the question of whether a police officer who engaged in what we might call “coercive interrogation,”

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<sup>42</sup> See *Frier v. City of Vandalia*, 770 F.2d 699, 704 (7th Cir. 1985) (referring the common nucleus of the operative fact to an identity of evidence: focusing on the “various elements of two causes of action to determine whether the same evidence is necessary to sustain both.”).

interrogation that was in violation of *Miranda*,<sup>43</sup> is subject to a damage claim under § 1983 when the suspect's responses to the interrogation are not used at any criminal trial.<sup>44</sup> I think there are a number of different issues here. There is a question of whether a damage claim could arise under § 1983 based on the Fifth Amendment self-incrimination clause,<sup>45</sup> and whether a damage claim could be based on substantive due process.<sup>46</sup> It seems the Justices had a very hard time with these issues, because they wrote six opinions. Justice Clarence Thomas announced the judgment of the Court and delivered an opinion;<sup>47</sup> Justice Souter delivered an opinion, Part II of which is the opinion of the Court, Part I of which is an opinion concurring in the judgment;<sup>48</sup> and some Justices joined in some opinions while other Justices joined in other opinions. I remember I did a column on this case and I had to make all kinds of charts for myself, because it is a case

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<sup>43</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966) The court held that to protect the privilege against self-incrimination, procedural safeguards are required; a defendant is required to be warned, before questioning, that he has the right to remain silent and have an attorney present. *Id.* at 444. Evidence obtained as a result of interrogation could not be used against a defendant at trial unless prosecution proved that the defendant knew of his rights and chose to waive them voluntarily. *Id.* at 479.

<sup>44</sup> *Chavez v. Martinez*, 538 U.S. 760, 772 (2003).

<sup>45</sup> *Id.* at 766-67. The Fifth Amendment states in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

<sup>46</sup> *Chavez*, 538 U.S. at 774. The Fourteenth Amendment states in pertinent part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

<sup>47</sup> *Id.* at 763-76.

<sup>48</sup> *Id.* at 777.

that required a lot of counting.<sup>49</sup>

PROFESSOR CHERMERINSKY: The facts are important in understanding this and they are tragic facts. Martinez was a migrant farm worker in Oxford, California who had the misfortune of truly being in the wrong place at the wrong time.<sup>50</sup> He was riding on his bicycle past where a police officer was questioning a suspect.<sup>51</sup> The officer ordered Martinez to get off of his bicycle, though Martinez was not suspected of anything.<sup>52</sup> The officer then did a pat down of Martinez and discovered in his belt a large knife of the sort used to cut strawberries.<sup>53</sup> When the officer felt the knife, Martinez began to run, and the officer called to his partner, "He's got my gun!"<sup>54</sup> The partner repeatedly shot at Martinez. As a result of the shooting, Martinez was left permanently paralyzed and permanently blinded.<sup>55</sup>

A sergeant came to the scene, Sergeant Chavez, and Chavez rode with Martinez in the ambulance and stayed with him

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<sup>49</sup> Martin A. Schwartz, *Challenging Coercive Police Interrogation Under § 1983*, N.Y.L.J., July 29, 2003, at 3.

<sup>50</sup> *Chavez*, 538 U.S. at 763.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 763-64.

<sup>54</sup> *Id.* at 764 ("The officers claim that Martinez drew [the officer's] gun from its holster . . . . Both sides agree, however, that [the officer] yelled, "He's got my gun!" ").

<sup>55</sup> *Chavez*, 538 U.S. at 764.

in the emergency room. Chavez questioned Martinez. Chavez's goal was to get Martinez to admit that he was responsible for the shooting occurring. In fact, Chavez tape-recorded the interaction with Martinez. Justice Stevens in his dissent reprints a couple of pages of the transcript of that tape.<sup>56</sup> Chavez is repeatedly asking Martinez what happened, and Martinez is screaming in pain.<sup>57</sup> Martinez is saying, "I don't want to say anything anymore . . . . I want them to treat me, it hurts a lot, please."<sup>58</sup> At one point, Martinez says, "I am dying, please."<sup>59</sup> Chavez says, "OK, yes you are dying, but tell me why you are fighting, were you fighting with the police?"<sup>60</sup> In the emergency room, at one point, Martinez says, "Aren't you going to treat me or what?"<sup>61</sup> Chavez repeatedly asked, "Look tell me what happened. I want to know . . . what happened with you."<sup>62</sup>

Martinez brings many claims against the officers and the City of Oxnard.<sup>63</sup> Among those claims are that his Fifth Amendment right against self-incrimination and his rights under the due process clause were violated by what Sergeant Chavez was doing.<sup>64</sup>

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<sup>56</sup> *Id.* at 784-86 (Stevens, J., dissenting).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 786.

<sup>59</sup> *Id.* at 784.

<sup>60</sup> *Chavez*, 538 U.S. at 785.

<sup>61</sup> *Id.* at 786.

<sup>62</sup> *Id.* at 785.

<sup>63</sup> *Id.* at 764-65.

<sup>64</sup> *Id.*



PROFESSOR SCHWARTZ: There is never a criminal prosecution against Martinez.<sup>65</sup>

PROFESSOR CHEMERINSKY: No criminal prosecution of Martinez for anything was ever brought.

PROFESSOR SCHWARTZ: Which is a key fact here and in trying to sort out these issues. If there was a criminal prosecution, then clearly an exclusionary rule under the Fifth Amendment and due process would bar the admission of any coerced statements and bar, at least in the state's direct case, any statements obtained as a result of *Miranda* violations.<sup>66</sup> The issues in this case concern the right to sue for damages under § 1983. I see the Fifth Amendment issue as really being two separate issues. First, can an individual who has not been subjected to a criminal prosecution sue for damages for violation of *Miranda*? A second Fifth Amendment issue is whether an individual who has been subjected to coercive interrogation, apart from the lack of *Miranda* warnings, can sue for damages under § 1983. A third question is the right to sue for damages for a substantive due process violation.

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<sup>65</sup> *Chavez*, 538 U.S. at 764.

<sup>66</sup> *Id.* at 772-73.

PROFESSOR CHEMERINSKY: I think analytically you are right, but that is not what the Supreme Court did. They do not focus on that distinction at all. In this instance, I think you were more right than they were, but they get the last word. I think I would summarize what the Court did in three steps: the first is what was *not* the holding in the case, and second is what I think the two holdings in the case are. The reason I begin with what was not the holding in this case is Justice Thomas, writing for the plurality, says that the Fifth Amendment privilege against self-incrimination is only testimonial. Specifically, that the Fifth Amendment privilege against self-incrimination applies only if the government attempts to use statements as evidence in criminal prosecution.<sup>67</sup> Until and unless that happens, Justice Thomas says there is no violation of the Fifth Amendment, no violation with regard to *Miranda* that matters, no violation with regard to coercive questioning that matters.<sup>68</sup> He says the Fifth Amendment just does not apply with regard to self-incrimination unless there is an effort to use the evidence at criminal trial.<sup>69</sup> Five justices reject that position even though it is written as the lead opinion, the plurality opinion.<sup>70</sup>

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<sup>67</sup> *Id.* at 766.

<sup>68</sup> *Id.* at 770.

<sup>69</sup> *Id.* at 767.

<sup>70</sup> *Chavez*, 538 U.S. at 777 (Souter, J., Breyer, J., Stevens, J., Kennedy, J., Ginsburg, J., plurality opinion).

Many newspaper articles I saw reported this as if it was the holding of the case, but it is not the holding. If that had received five votes and become the majority, it would have very important implications in civil litigation. Think of depositions you take where the person being deposed does not answer based on the Fifth Amendment. If the Fifth Amendment were only a testimonial privilege at criminal trials, then I would imagine the law would change to force people to answer in civil depositions. Then if it is ever used in a criminal trial, the deponent can object to its introduction. That is not what the Court does in *Chavez*.

There were two holdings, I think, in this case. First, there is no civil cause of action for money damages for violation of the Fifth Amendment privilege against self-incrimination.<sup>71</sup> Four in the plurality<sup>72</sup> and Justices Souter and Breyer concurring in the judgment come to that conclusion. They do not draw the analytical distinction that Professor Schwartz did. Whether it is a civil claim for money damages for violation of *Miranda* or a civil claim for money damages for coercive questioning in the sense the police did not stop their questioning when the suspect said leave me alone, they say there is no claim.<sup>73</sup> Justices Breyer and Souter said that the exclusionary rule in criminal cases is enough

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<sup>71</sup> *Id.* at 773, 777.

<sup>72</sup> *Id.* (Stevens, J., Kennedy, J., Ginsburg, J., plurality opinion).

<sup>73</sup> *Id.* at 778-79.

of a remedy; there is no need for money damages.<sup>74</sup> Under that rationale, it does not matter whether it is a 1983 claim against state and local police officers or a *Bivens*<sup>75</sup> claim against federal officers. Either way, there is no claim for money damages. However, the second part of the holding is that the Supreme Court says there may be a cause of action under the due process clause for unduly coercive, abusive behavior by police officers.<sup>76</sup>

PROFESSOR SCHWARTZ: Before you go there, I count six justices saying that there is no 1983 remedy for violation of *Miranda*, six Justices whose names are ascribed to opinions that take that position.

Two of the Justices say that the rationale is that *Miranda* decisional law is pretty complex, and whether there is a *Miranda* violation or not should be sorted out at the criminal trial, not in the 1983 context.<sup>77</sup> But what is really troublesome to me is four Justices saying that there is no § 1983 claim because *Miranda* protections are not constitutional rights, they are merely prophylactic, they are remedial.<sup>78</sup> The *Dickerson* decision three

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<sup>74</sup> *Id.* at 777.

<sup>75</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (stating that a violation of the Fourth Amendment protection against unreasonable searches and seizures by a federal agent acting under color of authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct).

<sup>76</sup> *Chavez*, 538 U.S. at 774.

<sup>77</sup> *Id.* at 772; *see id.* at 780 (Scalia, J., concurring).

<sup>78</sup> *Id.* at 760, 772 (Rehnquist, C.J., Scalia, J., O'Connor, J., and Thomas, J.).

years ago, written by the Chief Justice, clearly held that the Court not only reaffirms *Miranda* but that *Miranda* is a constitutional guarantee protected by the Fifth Amendment.<sup>79</sup> Now the Chief Justice signs his name onto an opinion that says *Miranda* protections are only prophylactic.<sup>80</sup> I find this part of the decision extremely troublesome in terms of the integrity of the Court. Maybe the public does not look at this carefully, but anybody that takes a careful look at it would say, wait a second, how about *Dickerson*?

PROFESSOR CHEMERINSKY: I think there have long been two lines of cases about *Miranda* from the Supreme Court. One treats *Miranda* as, in essence, as a common law rule created by the Court as a prophylactic device to enforce *Miranda*.<sup>81</sup> The other line of cases treats *Miranda* as something constitutionally required.<sup>82</sup> *Dickerson* in the year 2000 said *Miranda* is constitutionally required.<sup>83</sup> This involved a federal statute that said that confessions should be admissible in federal court even if federal law enforcement officers did not properly give *Miranda*

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<sup>79</sup> *Dickerson v. United States*, 530 U.S. 428, 432 (2000).

<sup>80</sup> *Chavez*, 538 U.S. at 772.

<sup>81</sup> See *id.*; see also *Oregon v. Elstad*, 470 U.S. 298, 309 (1985) (stating *Miranda* procedures are prophylactic); *Michigan v. Tucker*, 417 U.S. 433, 446 (1974) (stating the Supreme Court laid down prophylactic standards in *Miranda* to safeguard against self-incrimination).

<sup>82</sup> *Dickerson*, 530 U.S. at 432.

<sup>83</sup> *Id.*

warnings as long as the confession is voluntary.<sup>84</sup> The Supreme Court held seven to two that this is unconstitutional and that *Miranda* is constitutionally required.<sup>85</sup> Professor Schwartz is also right that four Justices, Thomas, Scalia, Rehnquist, and O'Connor, are treating *Miranda* more as a common law rule not constitutionally required.<sup>86</sup>

There are some important *Miranda* cases on the docket this term: *Missouri v. Seibert* involves police intentionally questioning somebody without *Miranda* warnings to get a statement, and going back and questioning the person again with *Miranda* warnings to get the same statement.<sup>87</sup> Is the latter statement excluded? There is a case, *United States v. Patane*, which involves whether the fruit of the poisonous tree doctrine applies when police intentionally question outside of *Miranda*.<sup>88</sup> These cases may give some sense of whether *Miranda* is, as

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<sup>84</sup> *Id.* (referring to federal statute 18 U.S.C. § 3501).

<sup>85</sup> *Id.* at 430. Chief Justice Rehnquist wrote the opinion, and Justices Scalia and Thomas dissented. *Id.*

<sup>86</sup> *Chavez*, 538 U.S. at 772.

<sup>87</sup> *Missouri v. Seibert*, 93 S.W.3d 700 (Mo. 2002), *cert. granted*, 538 U.S. 1031 (2003). In *Missouri v. Seibert*, 124 S. Ct. 2601 (2004), the court held that it was error to admit into evidence defendant's statements made while in custody because the police officer intentionally withheld *Miranda* warnings in order to elicit an initial confession with the hope that defendant would repeat the confession.

<sup>88</sup> *United States v. Patane*, 304 F.3d 1013 (10th Cir. 2002), *cert. granted*, 538 U.S. 976 (2003). In *United States v. Patane*, 124 S. Ct. 2620 (2004), the court held that a failure to give a suspect *Miranda* warnings does not require suppression of the physical fruits of the suspect's unwarned but voluntary statements.

*Chavez v. Martinez* says, just a common law device, or what *Dickerson* holds, a constitutional doctrine.

PROFESSOR SCHWARTZ: To me, *Dickerson* definitively resolved the issue. Professor Chemerinsky was about to get to the substantive due process holding in *Chavez*.<sup>89</sup> Eight justices take the position that, when the police engage in coercive questioning and the suspect's answers are not used in a criminal trial, the suspect might be able to assert a substantive due process claim.<sup>90</sup> One issue may be left open under the Fifth Amendment: what if the suspect's answers are used not at trial but, let us say, used in a preliminary hearing or at the grand jury? Would that give rise to a due process claim?

PROFESSOR CHEMERINSKY: In counting the Justices, it becomes a little more complicated. Five of the Justices in separate opinions said there may be a due process claim here and remanded the case to the Ninth Circuit for evaluation.<sup>91</sup> But when would there be a due process claim for abusive police questioning? Three Justices would reject the idea of a substantive

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<sup>89</sup> *Chavez*, 538 U.S. at 774.

<sup>90</sup> *Id.* (stating the Fourteenth Amendment's Due Process Clause would govern the inquiry of cases where police torture or other abuse results in statements not used at trial).

<sup>91</sup> *Id.* at 779-80. Justices Breyer, Souter, Stevens, Ginsburg, and Kennedy recognized the possibility of a due process claim. *Id.*

due process claim,<sup>92</sup> and Justice O'Connor just does not address that issue. It was five to three that there may be a due process claim. The Court doesn't articulate any standards and sends the case back to the Ninth Circuit on that issue.<sup>93</sup>

PROFESSOR SCHWARTZ: I think eight say there may be a substantive due process claim, but three of them reject it in this particular case. They leave open the possibility that there might be a substantive due process claim in another case. The substantive due process claim, I take it, is the "shocks the conscience" test.<sup>94</sup>

PROFESSOR CHEMERINSKY: They do not say. It is a puzzle here. The Supreme Court has generally refused to recognize substantive due process claims where there are other specific constitutional provisions.<sup>95</sup> Think of *Graham v. Connor*, which said that you cannot bring an excessive force claim under due

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<sup>92</sup> *Id.* at 775; *see id.* at 784 (Scalia, J., concurring). Chief Justice Rehnquist, and Justices Scalia and Thomas would reject a substantive due process claim.

<sup>93</sup> *Id.* at 779-80.

<sup>94</sup> *See County of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998) (describing conduct that "shocks the conscience" as acts so brutal or offensive as to offend due process); *Rochin v. California*, 342 U.S. 165, 169, 175 (1952) (describing acts that "shock the conscience" as those that offend canons of decency and fairness, and are offensive to human dignity).

<sup>95</sup> *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997) (stating that *Graham v. Connor*, 490 U.S. 386 (1989) requires that if a constitutional claim is covered by a specific constitutional provision, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process).



process claim because you have the Fourth Amendment.<sup>96</sup> Previously, it had been thought that excessive force was a "shocks the conscience" test under due process, but the Supreme Court rejects that.<sup>97</sup> What about malicious prosecution? The Supreme Court says you cannot bring malicious prosecution under due process; you have to bring that under the Fourth Amendment.<sup>98</sup> In *Chavez*, the Supreme Court is saying just the opposite: you cannot bring it under the specific constitutional provision, the self-incrimination clause, but you might be able to bring it under due process.<sup>99</sup> But will they adhere to their "shocks the conscience" test?

PROFESSOR SCHWARTZ: If it shocks the conscience, what is the standard? Is it a purpose to cause harm, is it deliberate difference? Professor Urbonya, do you have any reaction to this availability of substantive due process?

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<sup>96</sup> *Graham*, 490 U.S. at 388. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

<sup>97</sup> *Graham*, 490 U.S. at 394 (rejecting the "notion that all excessive force claims brought under § 1983 are governed by the single generic standard.").

<sup>98</sup> *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (holding that claims for prosecution without probable cause are within the purview of the Fourth Amendment and not substantive due process).

<sup>99</sup> *Chavez*, 538 U.S. at 774.

PROFESSOR URBONYA: The Supreme Court's *County of Sacramento v. Lewis* case, where the Court created this dichotomy,<sup>100</sup> that is, if you are challenging legislation under substantive due process you have one particular standard, where history and tradition are important starting points, and you consider the scope of liberty implicated. But if you are challenging an individual officer, which is a classic 1983 suit for damages, then it is the "shocks the conscience" test.<sup>101</sup> In a high-speed pursuit context, the Court said you have to show a purposeful act of malice, an intent to cause harm.<sup>102</sup> Even though the facts of *Chavez* are pretty hard to read, it almost sounds like the police officer knows the rules of evidence. "Do you think you are going to die?" is one of the questions the officer asks.<sup>103</sup> If the standard is—did the officer act maliciously or was the officer really just trying to do his job in this case by getting the information—would there be no "shocks the conscience" claim? Do you think that this will fly?

PROFESSOR BLUM: I think the Ninth Circuit did sustain a substantive due process claim here, and in fact denied qualified

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<sup>100</sup> *County of Sacramento*, 523 U.S. at 846 ("[C]riteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue."); see *Chavez*, 538 U.S. at 775.

<sup>101</sup> *County of Sacramento*, 523 U.S. at 846-47.

<sup>102</sup> *Id.* at 854.

<sup>103</sup> *Chavez*, 538 U.S. at 786 (Stevens, J., dissenting).

immunity on the claim.<sup>104</sup> In this context, "shocks the conscience" is your bottom line, but what it takes to shock the conscience is either going to be deliberate indifference or purpose to harm with no legitimate law enforcement purpose.<sup>105</sup> In this context, I could see a court applying deliberate indifference rather than the purpose to harm, which is like the high-speed pursuit state of mind requirement in an emergent situation.<sup>106</sup> Maybe if the guy is dying, you treat it as an emergency for him, but is it an emergency for the police officer who is deliberately pursuing with time to think or pursuing this line of conduct? I would say it would be "shocks the conscience," but deliberate indifference would be enough to shock your conscience in this context. I think the Ninth Circuit has denied qualified immunity given these facts.<sup>107</sup>

PROFESSOR SCHWARTZ: The Ninth Circuit opinion is about two paragraphs, and I just wonder whether that might be headed back to the Supreme Court.<sup>108</sup> One important point: when the United States Supreme Court says substantive due process may be available but self-incrimination is not, this is not just a question

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<sup>104</sup> *Martinez v. Oxnard*, 337 F.3d 1091, 1092 (9th Cir. 2003).

<sup>105</sup> *Id.*

<sup>106</sup> *County of Sacramento*, 523 U.S. at 836.

<sup>107</sup> *Martinez*, 337 F.3d at 1092 ("Chavez is not entitled to qualified immunity on Martinez's Fourteenth Amendment substantive due process claim.").

<sup>108</sup> *Id.* at 1091, *cert. denied*, *Chavez v. Martinez*, 124 S. Ct. 2932 (2004).

of substituting one constitutional label for another. Typically, the substantive due process standard would be much more difficult for a plaintiff to satisfy than the Fifth Amendment. Under the Fifth Amendment, the plaintiff could show the questioning was coercive. That would have been enough for a Fifth Amendment violation. Substantive due process shocks the conscience claims that prevail are few and far between. You can say the claim is there, and you can even say the Ninth Circuit sustained the claim, but I am not sure that substantive due process will provide meaningful protection.

PROFESSOR BLUM: It means it must not be true.

PROFESSOR CHEMERINSKY: There is such a bad rap on the Ninth Circuit. The Ninth Circuit's reversal rate is exactly the national average. Last year the Supreme Court reversed the lower courts 74% of the time and the Ninth Circuit got reversed 75% of the time.

PROFESSOR URBONYA: I concur. I often characterize the Ninth Circuit as the circuit that is most reversed,<sup>109</sup> yet the Fourth

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<sup>109</sup> See, e.g., Edward Lazarus, *In Defense of the Ninth Circuit Court of Appeals: Though the Ninth Circuit is Frequently Reversed by the Supreme Court that Does Not Mean it is Frequently "Wrong,"* FindLaw's Writ-Legal Commentary, July 11, 2002, available at <http://writ.news.findlaw.com/lazarus/20020711.html> (last accessed Sept. 8, 2004).

Circuit is the one that gets reversed from the other direction because it is so conservative.

PROFESSOR SCHWARTZ: Many more certiorari grants do come from the Ninth Circuit than other parts of the country. Let us move on to the two Megan's Law decisions: *Smith v. Doe* rejected an Ex Post Facto challenge to Alaska's Megan's Law<sup>110</sup> and *Connecticut Department of Public Safety v. Doe* rejected a challenge under a procedural due process claim.<sup>111</sup> These decisions were not surprising, but there are interesting aspects. With respect to Ex Post Facto, I see the Court taking a two-step approach, asking first, did the state legislature that promulgated Alaska's Megan's Law in the *Smith* case have the intent to punish?<sup>112</sup> The answer is no. That is not surprising because a legislative body would be pretty foolish to create some type of legislative history that says, we have enacted this Megan's Law because we want to impose more punishment on sex offenders. The second part of the analysis is whether the application of the Megan's Law has what the Court calls "punitive effects."<sup>113</sup> On that question, the Court stacks the deck against the individual by saying only the clearest proof would enable the punitive effects to

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<sup>110</sup> 538 U.S. 84, 105-06 (2003).

<sup>111</sup> 538 U.S. 1, 4 (2003).

<sup>112</sup> *Smith*, 538 U.S. at 92.

<sup>113</sup> *Id.*

outweigh a non-punitive legislative purpose.

PROFESSOR CHEMERINSKY: I see it almost as traditional: you can prove that something is an Ex Post Facto law if the purpose of the legislature is to punish or if you can show that the effect is to punish.<sup>114</sup> It is the latter question with which there are real problems in Justice Kennedy's analysis. Justice Stevens in his dissent says no one will ever convince him that having your name listed in a sex offender registry is not, practically speaking, a punishment.<sup>115</sup> None of us would want our name listed in the sex offender registry. Is that not, in practical effect, punishment?

Keep in mind the context of this case. The Court is not considering whether it is constitutional to have Megan's Law sex offender registries.<sup>116</sup> The question is whether such a law can be retroactively applied to someone who was convicted before the law was adopted.<sup>117</sup> Say Smith is convicted of a sex crime and then Alaska adopts its Megan's Law. Can the state apply the registry to him? Under the former analysis, the purpose was not to punish, it was to inform people there was a sex offender in the community.<sup>118</sup> I think it is much more troubling to say that the effect is not to punish and particularly troubling that the Court

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<sup>114</sup> *Id.* at 92-93.

<sup>115</sup> *Id.* at 112 (Stevens, J., dissenting).

<sup>116</sup> *Id.* at 92.

<sup>117</sup> *Smith*, 538 U.S. at 105.

<sup>118</sup> *Id.* at 98-99.

analyzed its effect by going back to purpose analysis when they are supposed to be separate.<sup>119</sup>

PROFESSOR SCHWARTZ: The bottom line is that the Court says that the punitive effects come mainly from the conviction, which is a matter of public record anyway.<sup>120</sup> My reaction to the decision is that it was written in what I would call a formalistic and sterile fashion. It almost avoids the type of real life impact that the Megan's Law has on the individual.<sup>121</sup>

The other case from the Second Circuit, *Connecticut Department of Public Safety v. Doe*, raised some very important potential issues for § 1983 litigation that did not get resolved.<sup>122</sup> Very briefly, the Second Circuit said Connecticut's Megan's Law works a deprivation of liberty, and therefore the state was required to provide the sex offender with an opportunity to be heard on the question of current dangerousness.<sup>123</sup> The United States Supreme Court did not resolve the question of whether there is a deprivation of liberty, which is really the big issue in the case.<sup>124</sup> Instead the Supreme Court said, assuming there was a

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<sup>119</sup> *Id.* at 105.

<sup>120</sup> *Id.* at 98.

<sup>121</sup> *Id.* at 109 n.\* (Souter, J., concurring).

<sup>122</sup> *Doe v. Dep't of Pub. Safety ex rel. Lee*, 271 F.3d 38 (2d Cir. 2001), *rev'd*, *Conn. Dep't of Pub. Safety*, 538 U.S. at 1.

<sup>123</sup> *Id.* at 62.

<sup>124</sup> *Conn. Dep't of Pub. Safety*, 538 U.S. at 7.

deprivation of liberty, there was no procedural due process violation.<sup>125</sup>

PROFESSOR CHEMERINSKY: Chief Justice Rehnquist's opinion is very narrow here. He said what the individual was asking for was a notice of hearing and determination that he was a continuing danger to the community before his name was listed in the sex offender registry.<sup>126</sup> Chief Justice Rehnquist says that the Connecticut sex offender registry makes no representation that the person is a continuing danger; all it says is that the person has been convicted of a particular crime.<sup>127</sup> Chief Justice Rehnquist says that it is factual; it is a matter of public record, so there is no need for due process.<sup>128</sup> If the sex offender registry went further than just listing the crime or if it made an affirmative representation about danger, that would be a different issue. That would implicate the question of a liberty interest in a reputation.<sup>129</sup> The Supreme Court said harm to reputation by itself is not enough.<sup>130</sup> It has to be "reputation plus," but what

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<sup>125</sup> *Id.* at 8. The Court held that the petitioner's claim was improperly framed; therefore, the Court refused to express an opinion as to whether the law violated petitioner's substantive due process rights. *Id.*

<sup>126</sup> *Id.* at 6.

<sup>127</sup> *Id.* at 7.

<sup>128</sup> *Id.* at 8.

<sup>129</sup> *Conn. Dep't of Pub. Safety*, 538 U.S. at 7.

<sup>130</sup> *Paul v. Davis*, 424 U.S. 693, 701 (1976) (holding that mere injury to reputation is not deprivation of a liberty interest).



does that mean?<sup>131</sup> Many thought this case would decide that, but the Court did not do so.

PROFESSOR SCHWARTZ: Is it implicit in the statutory scheme that the state believes that the individual is currently dangerous? Why else would the state place the individual's name on the registry, put it on a web-site, make it available in public records? What is the point of doing all of that if the state does not believe the individual is currently dangerous?

PROFESSOR CHEMERINSKY: I think what Chief Justice Rehnquist is saying is that the registry is simply another way of listing criminal convictions that are already in the public record.<sup>132</sup> There is no need for due process. Only if the registry makes some statement beyond the existence of the conviction will the issue of due process come up.<sup>133</sup> It is a formalistic distinction, but there is some logic to it.

PROFESSOR SCHWARTZ: There could be a substantive attack

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<sup>131</sup> Damage to reputation must be accompanied by the deprivation of another constitutionally protected liberty interest. *See, e.g., Corbitt v. Andersen*, 778 F.2d 1471, 1474-75 (10th Cir. 1985) (holding that damage to reputation plus the impairment of future employment may constitute a due process violation).

<sup>132</sup> *Conn. Dep't of Pub. Safety*, 538 U.S. at 7.

<sup>133</sup> *Id.*

on the failure of the legislation to require a determination of current danger. An individual could come into court and argue as a violation of substantive due process that the state put his name on this list, publicizing it all over, without bothering to make a determination whether he presents any danger to the community.

PROFESSOR CHEMERINSKY: I want to briefly mention one other sex offender case that has similar implications, *Stogner v. California*.<sup>134</sup> In 2003, *Stogner* retroactively extended the statute of limitations for sex crimes against children.<sup>135</sup> If an adult reported a sex crime that allegedly occurred when he or she was a child, prosecutors would have one year after the report to initiate a criminal action.<sup>136</sup> A man was prosecuted for sex crimes that allegedly occurred twenty-eight and forty-three years before the prosecution was initiated.<sup>137</sup> The Supreme Court, five to four, found this to be an impermissible Ex Post Facto law.<sup>138</sup> Justice Breyer, writing for the Court and joined by Justices Stevens, Souter, Ginsburg and O'Connor, stated that this is just criminal retroactivity.<sup>139</sup> I do not think it has any implication in the civil area, although I know defendants are trying to do so because the

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<sup>134</sup> 539 U.S. 607 (2003).

<sup>135</sup> *Id.* at 609.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 609-10.

<sup>138</sup> *Id.* at 632-33.

<sup>139</sup> *Stogner*, 539 U.S. at 616.

Supreme Court has repeatedly said the Ex Post Facto Clause applies only in criminal cases, while retroactive civil liability requires only rational basis review.

PROFESSOR SCHWARTZ: Let us go back to 1976 with *Paul v. Davis*<sup>140</sup> where the Court holds that injury to reputation alone does not constitute a deprivation of liberty.<sup>141</sup> The plaintiff must show some type of plus, which constitutes a deprivation of a tangible interest, and I would say that the Supreme Court here has done a tremendous disservice.<sup>142</sup> Since that 1976 decision, the lower courts have received no guidance from the Court, and litigators have no guidance as to what might constitute the plus other than the termination of public employment. Regarding the termination of public employment, the Supreme Court has found a deprivation of a tangible interest.<sup>143</sup> But what else might constitute a plus? Is the denial of a governmental contract a plus? Do the consequences of being on a Megan's law registry

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<sup>140</sup> 424 U.S. at 693.

<sup>141</sup> *Id.* at 701.

<sup>142</sup> See *Carey v. Piphus*, 435 U.S. 247, 259 (1978) ("This Clause 'raises no impenetrable barrier to the taking of a person's possessions,' or liberty or life. Procedural due process rules are meant to protect persons not from deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.").

<sup>143</sup> *Bd. of Regents v. Roth*, 408 U.S. 564, 578 (1972). The respondent's property interest was created by the terms of his employment contract which specifically provided that the employment would terminate. Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment and summary judgment should not have been granted because the respondent did not show a deprivation of liberty or property under the Fourteenth Amendment. *Id.*

constitute a plus? There is decisional law all over the country regarding this issue, but it is not all consistent. Maybe this was an opportunity for the Court to provide some guidance, but it did not take advantage of that opportunity. I think that was unfortunate.

JUDGE RAGGI: May I ask a question with respect to these laws? You said a moment ago that they are publicizing the information. What does one have to do to see a registry? Are they posted on Internet sites? Sometimes I wonder whether there is a practical issue that we ignore pertaining to the availability of this information whether or not there is a registry. As courts put more and more of their decisions on-line, and as search engines become easier to use, there will not be much decided by courts that will not be searchable.

PROFESSOR CHEMERINSKY: Is there a difference?

JUDGE RAGGI: There is a difference, but practically speaking, I have a flip side concern that as more and more of our district court cases are available on-line, public material that might be embarrassing because it involves a child or some incident becomes public record. All you would have to do is come down and hunt for it. Now, all of a sudden, every case would be on-line and searchable by the person's name. I do not think it

will be that long before, if you wanted to find out the names of every person who has committed murder or child abuse in the State of Missouri in the last twenty years, you will be able to find out that information.

PROFESSOR CHEMERINSKY: Yet, I still think there is a difference between being able to find the conviction by looking up the criminal records and having something listed in a sex offender registry. You are right that either way people can find the information, but I also think in terms of effect, as Justice Stevens says, there is a difference.<sup>144</sup>

JUDGE RAGGI: There is a difference, but we are also dealing with the policy question that a lot of parents are concerned with having access to this information. As this becomes more and more of a news story, it is becoming a public demand for the state to provide this information, and Professor Schwartz was suggesting that it was the state saying these people are dangerous.

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<sup>144</sup> *Smith*, 538 U.S. at 113 (Stevens, J., dissenting). In his dissent, Justice Stevens wrote that the Court:

will never persuade me that the registration and reporting obligations that are imposed on convicted sex offenders *and on no one else* as a result of their convictions are not part of their punishment. In my opinion, a sanction that (1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person's liberty is punishment.

*Id.*

Another way of looking at it is that the state does not want to make that decision. The state is basically saying that here is the information; you decide whether you want to have this person or whether you want to live next to this person. It is a little more complicated than just thinking that the state is looking to tar everyone. They may in fact be looking to avoid making the choice one way or another.

PROFESSOR SCHWARTZ: These are not cases where there are broad attacks on the concept of Megan's Law.<sup>145</sup> They are more of a nuance that contests the retroactive application Ex Post Facto.

JUDGE RAGGI: That is the ground on which it is being fought. It is a larger attack.

PROFESSOR SCHWARTZ: The Connecticut case is a case that asks for fair procedures, which is something normally even conservative jurists are attune to sometimes.<sup>146</sup> You can have a policy, but administer it with fair process because it is a process case.

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<sup>145</sup> See *Conn. Dep't of Pub. Safety*, 538 U.S. at 10.

<sup>146</sup> *Id.* at 7-8.

JUDGE RAGGI: Do you think that is the real concern? The reality would be that then there would be an individual hearing. Whether the state could devote the resources to that hearing would be a question, and then each one of those resources could be challenged individually.

PROFESSOR SCHWARTZ: That is the question. From a policy standpoint, it comes down to balancing the governmental interest against the potential harm to the individual whose name is placed on the list. Given the decision in *Connecticut Department of Public Safety v. Doe*, a state would probably be foolish to consider current dangerousness as a criterion for placing a name on a state's Megan's list.<sup>147</sup>

Let us move to the one prisoner's rights decision from last term, the *Overton* case.<sup>148</sup> The decision here was not a big surprise.

PROFESSOR CHEMERINSKY: That it was a unanimous decision I think was something of a surprise. In *Overton v. Bazzetta*, Michigan adopted a rule that greatly limited the ability of prisoners to have non-contact visits.<sup>149</sup> It said, for example,

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<sup>147</sup> *Id.* at 4.

<sup>148</sup> *Overton v. Bazzetta*, 539 U.S. 126 (2003).

<sup>149</sup> MICH. ADMIN. CODE r. 791.6609 (2004) provides in pertinent part:  
Limits on visitation: . . . (5) Subject to the restrictions in subrule (6) of this rule, a child who is under the age of 18 may

that a prisoner's child could only visit the prisoner with another adult present. It limited which prisoners could be visited by siblings. It stated that if a prisoner had been guilty of substance abuse in prison, then there would be almost no visits allowed except by clergy members. The prisoners claimed this violated their freedom of association.<sup>150</sup> They argued that the prison should only be able to restrict rights to the extent necessary to facilitate incarceration.<sup>151</sup> In essence, their argument was that prisoners had a right to have non-contact visits.

Unanimously, the Supreme Court rejected this argument, and utilized the *Turner v. Safley* test stating that, in evaluating prisoners' constitutional rights, the prison should prevail as long as the action is rationally related to a legitimate penological interest.<sup>152</sup> I think this is one of a number of recent Supreme Court cases where the Court expressly recognizes a need for great deference to prison authorities. You might remember *Shaw v. Murphy*<sup>153</sup> a couple of terms ago. It involved a prison that

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visit a prisoner only if the child is on the prisoner's approved visitors list and is accompanied by an adult immediate family member or a legal guardian . . . . (11) The director may permanently restrict all visitation privileges, except with an attorney or member of the clergy, for a prisoner who is convicted or found guilty of any of the following: (a) A felony or misdemeanor hat occurs during a visit. (b) A major misconduct violation. . . . (d) Two or more violations of the major misconduct charge of substance abuse.

<sup>150</sup> *Overton*, 539 U.S. at 131.

<sup>151</sup> *Id.* at 133.

<sup>152</sup> 482 U.S. 78, 89 (1987).

<sup>153</sup> 532 U.S. 223 (2001).



refused to allow a prisoner to correspond with a prisoner in another institution.<sup>154</sup> The Supreme Court unanimously said that if the prison finds it is desirable to intercept the letter, we have to defer to prison authorities.<sup>155</sup> I think the Supreme Court is giving emphatic deference to prison authorities with the use of rational basis review.

PROFESSOR SCHWARTZ: This creates a very heavy burden on the prisoner. One unusual thing about this *Turner* deference standard is that the Court, in *Turner*, articulated certain factors that should be taken into account.<sup>156</sup> One of those factors is whether there are ready alternatives to the regulation that makes it sound like it is not a test of deference.<sup>157</sup> It almost sounds like a least restrictive alternative, but the Court in *Overton* rejects this conclusion.<sup>158</sup> I do not know why the Court would ever say something like there should be an inquiry into whether there are ready alternatives when it seems like it does not seriously contemplate that as being a significant factor.

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<sup>154</sup> *Id.* at 226.

<sup>155</sup> *Id.* at 228.

<sup>156</sup> *Turner*, 482 U.S. at 89-91.

<sup>157</sup> *Id.* at 90.

<sup>158</sup> *Overton*, 539 U.S. at 136.

PROFESSOR CHEMERINSKY: *Turner v. Safely* involved whether prisoners had the right to marry.<sup>159</sup> The Supreme Court ruled in favor of the prisoners stating that a prison cannot have a per se rule against marriage by prisoners.<sup>160</sup> The Court articulated this test, rationally related to a legitimate penological interest, and developed specific factors, but used them there to rule in favor of the prisoner.<sup>161</sup> Post *Turner*, the test has been re-characterized by the Court as a traditional rational basis test where the action must be rationally related to some penological interest; there is no need for narrow tailoring or least restrictive alternatives.<sup>162</sup>

JUDGE PRATT: Do you think one reason the Court has become so rigid about prisoners is simply due to the volume of prisoner petitions that are flooding the federal courts?

PROFESSOR CHEMERINSKY: But that has gone way down

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<sup>159</sup> *Turner*, 482 U.S. at 82.

<sup>160</sup> *Id.* at 97 (holding that the right to marry is a fundamental right, even for prisoners, and a prison cannot have rules restricting marriage where they are not reasonably related to penological objectives).

<sup>161</sup> *Id.* (describing other factors relevant when determining whether the regulation is reasonable: first, there must be a valid connection between the prison regulation and government interest; second, it must be evaluated whether there are alternative means of exercising prisoner's rights; third, the impact of the asserted constitutional right on prison resources must be considered; and finally, it must be considered whether or not there are ready alternatives).

<sup>162</sup> *Overton*, 539 U.S. at 133.

since the Prison Litigation Reform Act.<sup>163</sup> Statistically, the number of prisoner suits has gone down very significantly because of the PLRA, and yet the Court still expresses deference even after the first PLRA, *Shaw* in 2001, and the *Overton* case in 2003.<sup>164</sup> I think it is less about the volume of prison cases and much more of a policy choice where the Supreme Court wants to minimize the role of the federal judiciary in overseeing prisons and resolving prisoner claims by giving tremendous deference to prison officials.

PROFESSOR SCHWARTZ: Now we are coming to Professor Chemerinsky's favorite subject, punitive damages. We could, I suppose, have a whole program on *State Farm Mutual Automobile Insurance Co.*<sup>165</sup> and the due process limits on punitive damages. First of all, I would observe that this is a decision that could have application in § 1983 cases. I have already seen it applied in a § 1981 case.<sup>166</sup>

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<sup>163</sup> 42 U.S.C. § 1997e (1994) provides in pertinent part:

(a) Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. § 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

<sup>164</sup> 42 U.S.C. § 1997e(a); *Shaw*, 532 U.S. at 223; *Overton*, 539 U.S. at 133.

<sup>165</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

<sup>166</sup> *Millazzo v. Universal Traffic Serv. Inc.*, 289 F. Supp. 2d 1251 (2003). In a Title VII action, the court reduced a \$375,000 punitive damages award against the defendant to \$50,000 for each plaintiff under 42 U.S.C. § 1981. The court cited to 42 U.S.C. § 1981(a) and stated:

PROFESSOR CHEMERINSKY: I would just remind everybody that you are allowed to sue individual officers under § 1983 for punitive damages under *Smith v. Wade*.<sup>167</sup> However, you cannot sue local governments for punitive damages under *City of Newport v. Fact Concerts, Inc.*<sup>168</sup>

PROFESSOR SCHWARTZ: This decision discussing when a jury comes back with an award of punitive damages could give the defendant an argument that the punitive damages are not only excessive, but possibly constitutionally excessive under the substantive component of the Due Process Clause.

PROFESSOR CHEMERINSKY: I agree. To go back a little bit, you might remember the 1996 case of *BMW v. Gore*.<sup>169</sup> The Supreme Court for the first time found a punitive damage award to be grossly excessive and violative of substantive due process.<sup>170</sup>

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in an action brought by a complaining party under [Title VII] . . . the complaining party may recover . . . punitive damages as allowed in subsection (b) . . . [which] provides that “the sum of the amount of . . . punitive damages awarded under this section . . . shall not exceed, for each complaining party . . . in the case of a respondent who has more than 14 and fewer than 101 employees . . . \$50,000.

*Id.* at 1255.

<sup>167</sup> 461 U.S. 30 (1983) (holding that punitive damages could be awarded in a proper § 1983 case where reckless indifference to an inmate’s constitutional rights existed).

<sup>168</sup> 453 U.S. 247 (1981) (finding that a municipality is immune from punitive damages under 42 U.S.C. § 1983).

<sup>169</sup> 517 U.S. 559 (1996).

<sup>170</sup> *Id.* at 585.

Ira Gore bought a BMW in Alabama and discovered that part of the vehicle had been repainted due to acid rain damage.<sup>171</sup> He sued and the jury awarded him four thousand dollars in compensatory damages and four million dollars in punitive damages, but the Alabama Supreme Court reduced the award to two million dollars.<sup>172</sup> The Supreme Court stated that even the award of two million dollars was grossly excessive.<sup>173</sup>

In support of its decision, the Court articulated a three-part test.<sup>174</sup> First and most importantly, the Court looked at the reprehensibility of the defendant's conduct.<sup>175</sup> The Court said that repainting cars is not all that reprehensible.<sup>176</sup> The Court also stressed that a jury in one state cannot award punitive damages for conduct that occurred in other states where it was not considered lawful.<sup>177</sup> Second, the Court said it is important to look at the ratio between the punitive damages and the harm or potential harm.<sup>178</sup> The Court here compared two million dollars in punitive damages to the four thousand in compensatory damages and found a large gap between the two.<sup>179</sup> Third, the Court analyzed the other punishment or sanctions available in the

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<sup>171</sup> *Id.* at 563.

<sup>172</sup> *Id.* at 565, 567.

<sup>173</sup> *Id.* at 574.

<sup>174</sup> *Gore*, 517 U.S. at 574-75.

<sup>175</sup> *Id.* at 575.

<sup>176</sup> *Id.* at 576.

<sup>177</sup> *Id.* at 574.

<sup>178</sup> *Id.* at 580.

<sup>179</sup> *Gore*, 517 U.S. at 582.

state for this behavior.<sup>180</sup> The fact that BMW would only be subjected to minor administrative fines shows that Alabama did not regard this offense as very serious.<sup>181</sup>

The Court applied this three-part test in *State Farm v. Campbell*.<sup>182</sup> This case involved a person with an automobile insurance policy with State Farm who got into an automobile accident. The jury found him liable and, at first, State Farm refused to pay.<sup>183</sup> At one point, even the agent said to the individual that he should start thinking about selling his house because they were not going to pay on his policy.<sup>184</sup> Ultimately, State Farm paid on the policy, but the individual sued State Farm for bad faith.<sup>185</sup> The jury awarded 2.6 million dollars in compensatory damages and 145 million dollars in punitive damages.<sup>186</sup> The Utah Supreme Court affirmed.<sup>187</sup>

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<sup>180</sup> *Id.* at 583.

<sup>181</sup> *Id.* at 584.

<sup>182</sup> *State Farm*, 538 U.S. at 418.

<sup>183</sup> *Id.* at 413.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 414.

<sup>186</sup> *Id.* at 416. The trial court reduced the compensatory damages award to one million and the punitive damages award to twenty-five million. *Id.* The Utah Supreme Court reinstated the 145 million dollar punitive damages award. *Id.*

<sup>187</sup> *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1143-53 (Utah 2001). The court analyzed seven factors under state law. *Id.* at 1143. It found that the ratio of punitive damages to compensatory damages was not a determinative factor but rather one of several to be considered in reviewing a punitive award. *Id.* at 1150. Both state and federal law do not establish a fixed ratio or cap on punitive damages, but are focused on deterring and punishing unlawful behavior. *Id.* at 1152-53. Even highly disproportionate ratios of compensatory to punitive damages pass muster, if reasonable, in the totality of the circumstances. *Id.* at 1146. State Farm injured many customers over a long

The Supreme Court, six to three, found this award to be unconstitutional.<sup>188</sup> Justice Kennedy, writing for the Court, utilized the *Gore* three-part test.<sup>189</sup> He stated first that reprehensibility is the most important factor.<sup>190</sup> He emphasized that we are not dealing with death or serious bodily injury.<sup>191</sup> Rather, we are talking about business fraud.<sup>192</sup> He also said that a jury should not be awarding punitive damages for unlike conduct; conduct that occurred in other states should have a nexus between the punitive damages and the specific conduct.<sup>193</sup> Second, he looked at the ratio between the punitive damages and the harm and potential harm.<sup>194</sup> He found that any ratio greater than single digits between the punitive and compensatory damages had to be justified, and that it would rarely be allowed.<sup>195</sup> He stated that when the ratio is as great as 145 to 1, there is a presumption against allowing it.<sup>196</sup> Kennedy commented that there is no bright

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period of time with potential for substantial future harm. *Id.* at 1149-50. State Farm's willful, malicious, and fraudulent conduct in the aggregate, coupled with the potential for great criminal and civil penalties, was sufficiently egregious to warrant a large award. *Id.* at 1144.

<sup>188</sup> *State Farm*, 538 U.S. at 429. The majority opinion was delivered by Justice Kennedy and joined by Chief Justice Rehnquist and Justices Stevens, O'Connor, Souter, and Breyer. Dissenting opinions were filed by Justices Scalia, Thomas, and Ginsburg. *Id.* at 411.

<sup>189</sup> *Id.* at 418.

<sup>190</sup> *Id.* at 419.

<sup>191</sup> *Id.* at 426.

<sup>192</sup> *Id.*

<sup>193</sup> *State Farm*, 538 U.S. at 422.

<sup>194</sup> *Id.* at 424.

<sup>195</sup> *Id.* at 425.

<sup>196</sup> *Id.* at 426.

line rule; not that large punitive damages awards greater than single digits are never allowed, but they have to be justified.<sup>197</sup>

The third prong concerned the other penalties in the state that the Utah Supreme Court had emphasized regarding criminal fraud.<sup>198</sup> Justice Kennedy argued that just because behavior amounts to criminal conduct does not justify the large punitive damage award.<sup>199</sup> He indicated that we have to be careful about not using civil justice to impose criminal penalties without following criminal procedure.<sup>200</sup>

PROFESSOR SCHWARTZ: The Supreme Court has not said whether the three factors must or should be part of the jury instructions. Should they be? By my way of thinking, at least the first two should be part of the jury instructions, but maybe not the third.

PROFESSOR CHEMERINSKY: To answer that, the Court does not say defendants are arguing that if there are not jury instructions about these factors, then they are defective. Defendants are doing this all over the country. I do not think the jury instructions have to track the *State Farm* factors as long as they point the jury to evaluating reprehensibility; that is, as long

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<sup>197</sup> *Id.* at 425.

<sup>198</sup> *State Farm*, 538 U.S. at 428.

<sup>199</sup> *Id.*



as they ask the jury to decide what amount of punitive damages is appropriate to achieve the goals of punitive damages, retribution and deterrence. I do not think that instructions have to track the exact language from the Supreme Court because there are really two different things going on here. One is what the appropriate factors are for a jury to consider in determining punitive damages, and the other is the court's determination of when a punitive damages award is so large as to violate due process.<sup>201</sup>

PROFESSOR SCHWARTZ: Would you want the jury to focus on reprehensibility?

PROFESSOR CHEMERINSKY: Of course.

PROFESSOR SCHWARTZ: Would you want the jury to focus on the ratio? In other words, if the jury focused on these factors

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<sup>200</sup> *Id.*

<sup>201</sup> See *State Farm*, 538 U.S. at 427-29 (deeming a 145 to 1 ratio of compensatory damages to punitive damages "an irrational and arbitrary deprivation of the property of the defendant."); *Romo v. Ford Motor Co.*, 122 Cal. Rptr. 2d 139, 165 (Cal. Ct. App. 2002), *cert. granted, vacated by* 538 U.S. 1028 (2003) (upholding a 290 million dollar punitive damage award and stating "[o]nly when an award can fairly be categorized as 'grossly excessive' in relation to [the state's legitimate interests in punishment and deterrence] does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.") (citing *Gore*, 517 U.S. at 568). On remand, the appellate court held that a punitive damages award of \$23,723,287, approximately five times the total compensatory damages award, was appropriate. *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 813 (Cal. Ct. App. 2003).

in determining the amount of the award, maybe there would be fewer problems in terms of challenges to punitive damages.

PROFESSOR CHEMERINSKY: Yes, although I do not think you have to use the word “reprehensibility.”

PROFESSOR SCHWARTZ: With jury instructions generally you do not have to use a particular magical word, but the concept should be there.

PROFESSOR CHEMERINSKY: They are already there. I am not familiar with the New York Pattern Jury Instructions, but the California instructions, with regard to punitive damages, already have the jury evaluate reprehensibility.<sup>202</sup> They already ask the jury to determine what amount of punitive damages is appropriate, in light of the compensatory damages, to punish the defendant. I do not think you are going to find a problem with

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<sup>202</sup> CIV. COMM. CAL. JURY INSTRU. 14.71.2 (2004) provides:

In determining whether the conduct upon which you have based your finding of liability is reprehensible, and if so, the degree of that reprehensibility, you should consider whether:

1. The harm caused was physical as opposed to economic;
2. The wrongful conduct demonstrated an indifference to or a reckless disregard of the [rights,] health or safety of others;
3. The plaintiff[s] [was] [were] financially vulnerable;
4. The conduct involved repeated actions or was an isolated incident; and
5. The harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

the jury instructions unless it goes to something like a magic word.

PROFESSOR SCHWARTZ: I cannot really see putting the third requirement in the jury instructions. Consider the other penalties? That is more of a legal question.

PROFESSOR CHERMERINSKY: I agree with you.

PROFESSOR SCHWARTZ: I want to point out a Ninth Circuit case called *Wei Zhang v. American Gem Seafoods*,<sup>203</sup> which discusses an employment discrimination claim under § 1981, or maybe more accurately, a national origin discrimination case. The Ninth Circuit, under *State Farm*, upheld a punitive damage award of 2.6 million dollars where the compensatory damages were \$360,000.<sup>204</sup> One of the points made was that in cases involving racial discrimination, high punitive damages are fairly standard these days.

Let us briefly look at the docket of the cases affecting § 1983 litigation this present term. There is a case called *Hibbs v.*

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<sup>203</sup> 339 F.3d 1020 (9th Cir. 2003).

<sup>204</sup> *Id.* at 1044-45.

*Winn*<sup>205</sup> which deals with the Tax Injunction Act.<sup>206</sup> This case involves another one of those jurisdictional rules that, depending on how it is interpreted, could get the plaintiff kicked out of federal court.<sup>207</sup> However, if it is interpreted in a certain way, the claim may stay in federal court.<sup>208</sup> The issue here is whether the Tax Injunction Act, which generally bars federal courts from enjoining, suspending, or restraining the collection of a tax, would apply to a challenge to a state's tax credit program.<sup>209</sup> In *Hibbs*, the challenge falls under the Establishment Clause.<sup>210</sup> As a result, the Ninth Circuit stated that the Tax Injunction Act did not apply.<sup>211</sup> I think it is going to be reversed.

PROFESSOR CHEMERINSKY: The Tax Injunction Act prohibits a federal court from enjoining the collection of a state or local tax as long as there is a plain, speedy, and effective remedy in state court. The question then becomes whether a tax credit is regarded as a tax under the meaning of the Tax Injunction Act.

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<sup>205</sup> *Winn v. Killian*, 307 F.3d 1011 (9th Cir. 2002); *cert. granted*, *Hibbs v. Winn*, 539 U.S. 986 (2003). In *Hibbs v. Winn*, 124 S. Ct. 2276 (2004), the Court held that the Tax Injunction Act does not bar federal court actions challenging the enforcement of a state statute allowing a tax credit for payments made to parochial schools as violating the Establishment Clause.

<sup>206</sup> 28 U.S.C. § 1341 (2004) ("The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.").

<sup>207</sup> *Winn*, 307 F.3d at 1015.

<sup>208</sup> *Id.* at 1017.

<sup>209</sup> *Id.* at 1013.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 1018.

The case involved an Arizona law that allowed individuals a tax credit of up to \$500 for private school tuition.<sup>212</sup> The Ninth Circuit held that a tax credit is not a tax, and the federal court could enjoin on the grounds that a tax credit for private schools violated the Establishment Clause.<sup>213</sup> The Supreme Court has given the Tax Injunction Act a broad interpretation, and I think the Supreme Court is going to say, yes, a tax credit is a tax.

PROFESSOR SCHWARTZ: We are not making any representation that it will necessarily be decided that way. The second case, *Frew v. Hawkins*,<sup>214</sup> is an Eleventh Amendment case.<sup>215</sup> Marcia Coyle of *The National Law Journal* wrote an article discussing the implications of the case.<sup>216</sup> This is the sleeper case on the Court's docket.

PROFESSOR CHEMERINSKY: It is a case that could potentially have huge practical implications. What is involved here is a

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<sup>212</sup> *Winn*, 307 F.3d at 1013.

<sup>213</sup> *Id.* at 1015, 1018.

<sup>214</sup> *Frazar v. Gilbert*, 300 F.3d 530 (5th Cir. 2002), *cert. granted*, *Frew v. Hawkins*, 538 U.S. 905 (2003).

<sup>215</sup> U.S. CONST. amend. XI provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

<sup>216</sup> Marcia Coyle, *Sleeper Case on the High Court Docket: Can States be Held to Consent Decrees?* NAT'L L.J., October 6, 2003, at 1 (discussing whether waiving immunity by entering into litigation qualifies as an exception to a state's immunity from private suits under the Eleventh Amendment).

lawsuit that was brought against Texas officials for violations of the federal Medicare/Medicaid provisions of the Social Security Act.<sup>217</sup> The state officials entered into a consent decree with the plaintiffs to resolve the claims, but the state did not live up to its bargain; it violated the terms of the consent decree.<sup>218</sup> The plaintiffs went to federal court to enforce the consent decree by suing the state officials under *Ex Parte Young*.<sup>219</sup>

The state came back and argued that an individual cannot sue under *Ex Parte Young* to enforce the consent decree.<sup>220</sup> The state established that *Ex Parte Young* allows a suit against state officials only if it is alleged that the officials violated the Constitution and laws of United States.<sup>221</sup> A consent decree is not

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<sup>217</sup> *Frazar*, 300 F.3d at 533.

<sup>218</sup> *Id.* at 535-36 (citing *Frew v. Gilbert*, 109 F. Supp. 2d 579 (E.D. Tex. 2000)). The defendants violated the terms of the consent decree by:

failing to 1) implement properly the outreach program and deliver required outreach reports; 2) assure that all class members receive medical and dental checkups; 3) develop and implement annual corrective action plans both for counties that lag behind the statewide average for checkups and for the state's medical transportation system; 4) operate the state's managed care system consistently with the mandates of the decree; 5) operate toll-free numbers so as to ensure that all calls are answered promptly by a knowledgeable and helpful staff member; 6) provide case management to all class members who need it, statewide; 7) develop methods to study each agreed health outcome measure; and 8) provide EPSDT training for health care providers.

*Id.*

<sup>219</sup> *Id.* at 540.

<sup>220</sup> *Id.* at 536.

<sup>221</sup> *Id.* at 538 (citing *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 525 (5th Cir. 1994)).

part of the constitution or laws of the United States, so there is no ability to bring an action to enforce it.<sup>222</sup> Thereafter, the Fifth Circuit bought the state's argument. It stated that individuals could not sue state officers to enforce a consent decree.<sup>223</sup> If the Supreme Court affirms, then there is no reason in the world for plaintiffs to ever enter into settlements or consent decrees with states because the states will never live up to the bargain. I think for that practical reason the Supreme Court is likely to reverse the Fifth Circuit. The Supreme Court so often talks about the value of settlement.<sup>224</sup> They want to encourage settlement under Rule 68 of the Federal Rules of Civil Procedure.<sup>225</sup> However, I think the Supreme Court is going to say that if the state enters into a consent decree, it is in essence waiving its sovereign

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<sup>222</sup> *Frazar*, 300 F.3d at 540.

<sup>223</sup> *Id.* at 548 (dismissing that the children petitioners' § 1983 action because plaintiffs only showed the violation of a decree rather than the violation of a statutory provision).

<sup>224</sup> See *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 312 (2002) (cautioning against actions by courts that would "discourage employers from entering into settlement agreements and thus frustrate Congress' desire to expedite relief for victims of discrimination"); *Marek v. Chesny*, 473 U.S. 1, 10 (1985) (stating clearly that "settlements rather than litigation will serve the interests of plaintiffs as well as defendants").

<sup>225</sup> FED. R. CIV. P. 68 states in pertinent part:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter the judgment.

immunity, and you can sue the state officers to enforce the consent decree.<sup>226</sup>

PROFESSOR SCHWARTZ: There is Supreme Court authority for the proposition that once a federal court grants relief against the state, the Eleventh Amendment is inapplicable when the federal court is asked to enforce that relief. That was what *Hutto v. Finney*<sup>227</sup> held a number of years ago.

PROFESSOR CHEMERINSKY: *Hutto v. Finney*, if you remember, was the ability to collect attorney's fees under § 1988, and the Supreme Court said it was both collateral and permissible, and here the plaintiffs rely in part on *Hutto v. Finney*.<sup>228</sup> They rely, I think, on the basic rationale of *Ex Parte Young*; individuals can sue the state officers even when they cannot sue the state government.<sup>229</sup> They say in essence that a consent decree to enforce federal law should be thought of as a product of the federal law.<sup>230</sup>

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<sup>226</sup> Subsequent to this conference, in *Frew v. Hawkins*, 540 U.S. 431 (2004), the Court held that state officers may be sued to enforce a consent decree, but did not address the waiver question.

<sup>227</sup> 437 U.S. 678 (1978).

<sup>228</sup> *Id.* at 693.

<sup>229</sup> *Frazar*, 300 F.3d at 540.

<sup>230</sup> *Id.* at 535.



PROFESSOR SCHWARTZ: Another case coming to the Supreme Court from the Ninth Circuit is *Ramirez v. Butte-Silver Bow County*<sup>231</sup> discussing qualified immunity.

PROFESSOR CHEMERINSKY: It is a Fourth Amendment case that involves the contents of a search warrant. What happened here was that the affidavit submitted in support of the search warrant contained all the required details, but the search warrant did not.<sup>232</sup> Then a lawsuit was brought under § 1983 arguing that the search warrant violated the Fourth Amendment and the Ninth Circuit agreed.<sup>233</sup> The question is how much detail has to be in the warrant itself as opposed to the affidavit in support of the warrant.<sup>234</sup> It applies both to the Fourth Amendment context and the § 1983 context.

PROFESSOR SCHWARTZ: But the larger issue may be qualified immunity.

PROFESSOR CHEMERINSKY: Right. That is correct.

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<sup>231</sup> *Ramirez v. Butte-Silver Bow County*, 298 F.3d 1022 (9th Cir. 2002), *cert. granted*, *Groh v. Ramirez*, 537 U.S. 1231 (2003). Subsequently in *Groh v. Ramirez*, 540 U.S. 551 (2004), the Court held that a search warrant must state with particularity that which is to be searched and seized.

<sup>232</sup> *Ramirez*, 298 F.3d at 1025.

<sup>233</sup> *Id.* at 1026 (holding that the warrant was facially defective because it “provided no description of the evidence sought. . . . [Nor did it] . . . refer to or incorporate the application or affidavit.”).

<sup>234</sup> *Id.* at 1025.

PROFESSOR SCHWARTZ: There is a case which I think could be very important, *Muhammad v. Close*,<sup>235</sup> which discusses the extent of the doctrine of *Heck v. Humphrey*.<sup>236</sup> It poses the question of whether the *Heck* doctrine applies to a prisoner claim where the prisoner is challenging a disciplinary sanction and, when the prisoner asserts the § 1983 claim, the prisoner is not confined so that he or she does not have habeas corpus as a potential remedy. The question then becomes whether the prisoner can now use § 1983 even though the disciplinary sanction has not been overturned. If five Justices stick to their word from *Spencer v. Kemna*, the answer is that the plaintiff should be able to sue under § 1983.<sup>237</sup>

PROFESSOR CHEMERINSKY: I think the case is, as you say, very important because it goes to defining the scope of *Heck v. Humphrey*. Remember, in *Heck*, the Supreme Court held that individuals convicted of a crime could not bring a civil suit which essentially challenges the conviction until the conviction has been

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<sup>235</sup> *Muhammad v. Close*, 47 Fed. Appx. 738 (6th Cir. 2002), *cert. granted*, 539 U.S. 925 (2003). In *Muhammad v. Close*, 540 U.S. 749 (2004), the Court unanimously ruled that *Heck v. Humphrey*, 512 U.S. 477 (1994) did not apply to all prisoner challenges to prison disciplinary proceedings and that the Court of Appeals decision disallowing petitioner's challenge to the prison guard's actions under § 1983 was erroneous.

<sup>236</sup> *Heck*, 512 U.S. at 477.

<sup>237</sup> 523 U.S. 1, 17 (1998) ("This is a great *non sequitur*, unless one believes (as we do not) that a § 1983 action for damages must always and everywhere be available. It is not certain, in any event, that a § 1983 damages claim would be foreclosed.").

overturned on appeal, on habeas, or by clemency.<sup>238</sup> In other words, you cannot bring a malicious prosecution suit if convicted until that conviction is overturned. I always thought that *Heck* was simply based on collateral estoppel issue preclusion. The conviction establishes that it was not malicious prosecution, so the individual cannot bring a civil suit to challenge that unless the conviction is overturned. Then, in *Edwards v. Balisok*,<sup>239</sup> the Supreme Court extended it beyond just collateral estoppel. *Edwards* involved a prisoner who was denied good-time credit when it was revoked, and the prisoner brought a § 1983 suit arguing that the reason for the denial was retaliation by the prison officials.<sup>240</sup> They had allegedly misstamped with regard to the timing of his grievance, and denied him access to witnesses.<sup>241</sup> The Supreme Court still said *Heck* applied.<sup>242</sup> I think this case is really going to rest on how far the Court is going to extend *Heck*, especially where the prisoner is challenging the conditions of confinement rather than the fact or duration of confinement.

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<sup>238</sup> *Heck*, 512 U.S. at 487 n.8 (noting that “if a state criminal defendant brings a federal civil-rights lawsuit during the pendency of his criminal trial, appeal, or state habeas action, abstention may be an appropriate response to the parallel state-court proceedings.”).

<sup>239</sup> 520 U.S. 641 (1997).

<sup>240</sup> *Id.* at 643-44.

<sup>241</sup> *Id.* at 646-47 (“It appears that all witness testimony in his defense was excluded.”).

<sup>242</sup> *Id.* at 645 (stating that the principle suggested by the New York Court of Appeals was erroneous, “since it disregards the possibility, clearly envisioned by *Heck*, that the nature of the challenge to the procedures could be such as necessarily to imply the invalidity of the judgment.”).

JUDGE BLOOM: Can I add to that? That was the time *Sandin v. Conner*<sup>243</sup> was decided. When you are talking *Edwards* and *Spencer*, you are discussing another area where the issue was also being developed and retrenched by the Rehnquist Court. The *Sandin* case was where you got the flip on whether you can sue under § 1983 for disciplinary proceedings as a deprivation of a liberty interest.<sup>244</sup> Previously, if there was a mandatory statute in the state code and the officials did not give the prisoner something that he was entitled to, he could bring a disciplinary due process case under § 1983.<sup>245</sup> In *Sandin*, Rehnquist overruled

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<sup>243</sup> 515 U.S. 472 (1995).

<sup>244</sup> *Id.* at 477-80. In *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974), the Court held that “the Due Process Clause itself does not create a liberty interest in credit for good behavior, but that the statutory provision created a liberty interest in a ‘shortened prison sentence’ which resulted from good time credits, credits which were revocable only if the prisoner was guilty of serious misconduct.” In *Meachum v. Fano*, 427 U.S. 215, 224 (1976), the Court held that “the Due Process Clause did not itself create a liberty interest in prisoners to be free from intrastate prison transfers” because a “transfer to a maximum security facility, albeit one with more burdensome conditions, was within the normal limits or range of custody which the conviction has authorized the State to impose.” Furthermore, in *Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1 (1979), the “State ultimately prevailed because the minimal process it had awarded the prisoners was deemed sufficient under the Fourteenth Amendment.” Nevertheless, the Court “apparently accepted the inmates’ argument that the word “shall” in the statute created a legitimate expectation of release absent the requisite finding that one of the justifications for deferral existed, since the Court concluded that some measure of constitutional protection was due.” Later, in *Hewitt v. Helms*, 459 U.S. 460, 468 (1983), the Court “rejected the inmates’ claim of a right to remain in the general population as protected by the Due Process Clause on the authority of *Meachum*, *Montanye*, and *Vitek*.” “The Due Process Clause standing alone confers no liberty interest in freedom from state action taken within the sentence imposed.”

<sup>245</sup> *Sandin*, 515 U.S. at 481 (“By shifting the focus of the liberty interest inquiry to one based on the language of a particular regulation, and not the nature of the deprivation, the Court encouraged prisoners to comb regulations in search of

his decision in *Hewitt* and said we are not going to parse state statutes that way; rather, we are really going to look and see whether there was a liberty interest created here and we are going to look at what the penalty is before we go back to look and see what the process was.<sup>246</sup> So when you are talking about *Edwards* and *Heck*, and when you are looking at *Ramirez*, I think they are all interrelated.

I think the *Heck* decision is also going to be applied in situations like the search warrant. I think that is what happened in the *Chavez* case this year. They are trying to rule out what types of things can be brought through a civil action under § 1983 when there has already been another forum or could have been another forum through which this could have been addressed. I did have one question going back to *Chavez* that I think relates to *Heck*. In *Chavez*, was there an excessive force claim brought by the plaintiff? What happened to that in the Ninth Circuit when it went back?

PROFESSOR SCHWARTZ: The opinion on remand only deals

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mandatory language on which to base entitlements to various state-conferred privileges. Courts have, in response, and not altogether illogically, drawn negative inferences from mandatory language in the text of prison regulations.”).

<sup>246</sup> *Id.* at 482 (noting that “[t]he approach embraced by *Hewitt* discourages this desirable development: States may avoid creation of “liberty” interests by having scarcely any regulations, or by conferring standardless discretion on correctional personnel”; the Court further concluded that “the search for a negative implication from mandatory language in prisoner regulations has

with the coercive questioning.<sup>247</sup> It is a very brief opinion. It is very conclusory and states that not only did the questioning violate substantive due process, but it also violated clearly established substantive due process rights.<sup>248</sup> That occurred in the face of three Justices saying there was no violation of substantive due process.<sup>249</sup>

PROFESSOR CHEMERINSKY: The excessive force claim was separated out, but I think it is still pending.

PROFESSOR SCHWARTZ: Lastly, in this past term in the Supreme Court there were no Fourth Amendment decisions, which is unusual, but next term we are going to have an influx of Fourth Amendment decisions. The large bulk of Supreme Court Fourth Amendment decisions come about in criminal prosecution cases. I think that all or virtually all of those Fourth Amendment decisions ultimately find their way into the law of § 1983. When I first started to get heavily involved in § 1983 law, I created some fiction in my mind that I did not have to pay attention to the criminal cases, but, of course, you learn very quickly that all

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strayed from the real concerns undergirding the liberty protected by the Due Process Clause.”).

<sup>247</sup> *Martinez v. City of Oxnard*, 337 F.3d 1091, 1092 (2003) (“[T]he Court left open the possibility that Chavez’s coercive interrogation of Martinez violated his then clearly established due process rights under the *Fourteenth Amendment*.”).

<sup>248</sup> *Id.*

<sup>249</sup> *Chavez v. Martinez*, 538 U.S. 760, 774 (2003).

those criminal decisions, not just the Fourth Amendment, but also the Fifth Amendment, relate to § 1983.

PROFESSOR CHEMERINSKY: There are about seven cases at this point. *Maryland v. Pringle*<sup>250</sup> involves the issue of the police stopping a car, seeing a driver and two passengers, and finding contraband in the car without knowing who owns it.<sup>251</sup> Can they arrest everybody present in the vehicle? *Illinois v. Lidster*<sup>252</sup> was argued last week. That case involved a hit and run driver, and the police set up a roadblock at the intersection where the accident occurred.<sup>253</sup> The police spot an individual at the roadblock who is obviously intoxicated.<sup>254</sup> Can they arrest that person for driving under the influence? Is that a legitimate use of a roadblock?

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<sup>250</sup> *Pringle v. State*, 785 A.2d 790 (Md. Ct. Spec. App. 2001), *cert. granted*, *Maryland v. Pringle*, 538 U.S. 921 (2003). In *Maryland v. Pringle*, 540 U.S. 366 (2003), the Court held that there was probable cause to arrest all of the occupants in the vehicle.

<sup>251</sup> *Pringle*, 785 A.2d at 793 (stating that after the police officers stopped the speeding vehicle and found cocaine in the armrest and backseat, all three passengers denied ownership of the drugs resulting in the arrest of all three men).

<sup>252</sup> *People v. Lidster*, 747 N.E.2d 419 (Ill. App. Ct. 2001), *cert. granted*, *Illinois v. Lidster*, 538 U.S. 1012 (2003). In *Illinois v. Lidster*, 540 U.S. 419 (2004), the Court held that the checkpoint stop leading to the defendant's arrest was constitutional because it assisted the police in obtaining information on the crimes that took place earlier.

<sup>253</sup> *Lidster*, 747 N.E.2d at 420-21.

<sup>254</sup> *Id.* at 421. The respondent's minivan swerved near the checkpoint drawing the attention of the police officers. When he was stopped, Lidster was given a sobriety test which he failed. He was subsequently arrested. *Id.*

Furthermore, in *United States v. Banks*,<sup>255</sup> the police entered a dwelling after they knocked and announced their presence. How long do they have to wait before entering the building? In this case, the police knocked and waited fifteen to twenty seconds, but the occupant was in the shower and did not answer before the police burst in.<sup>256</sup> Is fifteen to twenty seconds enough? In *Thornton v. United States*,<sup>257</sup> can the police search a vehicle incident to arrest if the suspect exits the car and is arrested directly thereafter right in front of the car? *Hiibel v. Sixth Judicial District Court*<sup>258</sup> is another very important case. Can the police arrest a person for refusing to identify himself? In *Hiibel*, an individual was stopped by the Nevada police, and refused to give his name to the police.<sup>259</sup> Is that sufficient for probable cause to be a basis for arrest? Can the government create a duty for an individual to identify himself to the police? I think it is amazing that there are so many Fourth Amendment cases during this one term.

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<sup>255</sup> 282 F.3d 699 (9th Cir. 2002), *cert. granted*, 537 U.S. 1187 (2003). In *United States v. Banks*, 540 U.S. 31 (2003), the Court held that the officers did not violate the defendant's constitutional rights by storming into his house while he was in the shower and that police lawfully entered the dwelling.

<sup>256</sup> *Banks*, 282 F.3d. at 702.

<sup>257</sup> *United States v. Thornton*, 325 F.3d 189 (4th Cir. 2003), *cert. granted*, 540 U.S. 980 (2003). In *Thornton v. United States*, 541 U.S. 615 (2004), the Court held that the officer's search subsequent to the defendant exiting the car was justified and did not violate the defendant's constitutional rights.

<sup>258</sup> 59 P.3d 1201 (Nev. 2002), *cert. granted*, 540 U.S. 965 (2003). In *Hiibel v. Sixth Judicial Dist. Ct.*, 124 S. Ct. 2451 (2004), the Court held that the *Terry* stop did not violate defendant's Fourth Amendment rights.

<sup>259</sup> *Hiibel*, 59 P.3d at 1203.



PROFESSOR BLUM: One quick word on the *Heck* and *Muhammad* cases. I have seen a lot of cases recently where individuals have been either framed or otherwise and have spent a lot of time in jail. Some have spent over twenty years in jail and have eventually died there. Subsequently, it comes to the attention of the authorities that in fact the individual was wrongly convicted. The conviction has not been overturned and there has been no writ of habeas corpus or anything. There are big cases pending now in Boston with those same kinds of facts that question whether *Heck* applies. Thus, the question is whether these individuals, or their estates, can bring a § 1983 suit for wrongful conviction for having spent 20 years of their lives in jail or then died in jail given the fact that their convictions have not been overturned.

JUDGE RAGGI: I have a question for Professors Schwartz and Chemerinsky. Do you think with the substantive due process claim in what we would call a traditional Fifth Amendment context that courts will focus primarily on the condition of the person being questioned, the reason for the police officer questioning, or both? What will be relevant to the substantive due process evaluation?

PROFESSOR SCHWARTZ: If it is a “purpose to cause harm” standard, which it is when a court comes to the conclusion that it

is a rapidly evolving tense situation, then the focus goes to what is in the mind of the officer, and that is all. I tend to disagree with some of the comments made earlier. I think the Supreme Court would say that this is a tense, rapidly evolving situation. It is not one of these situations where there is a lot of time to deliberate. It all happens quickly. It is true that the officer is formulating question after question, but it is all happening in tense circumstances with a suspect who is in custody, who is seriously injured. Deliberate indifference applies when there was a realistic opportunity to deliberate. Was the officer deliberately indifferent given the facts and circumstances known to the officer? Did the officer possibly ignore some of the facts and circumstances? They are two very different substantive due process tests.

PROFESSOR CHEMERINSKY: The problem I have with that is, this situation is not coming up in a Fourth Amendment excessive force context; it is coming up in a Fifth Amendment context for violations of privilege and self-incrimination. The intent on the part of the officer is always going to be to gain information. We are not just focusing on whether it was excessive force. If we look at the purpose of the officer, the officer can avoid liability by claiming he was trying to get answers to his questions. This would never result in liability. I think, therefore, it has to go beyond that. Most likely, the Court

is going to look at the behavior of the officer under the circumstances and whether it shocks the conscience. If the officer is torturing the suspect, I think under those circumstances the Court is not going to allow it. We can come up with the hypothetical situation where there is a bomb planted in the middle of the city that is about to go off and the officer is torturing the suspect to get answers. Some might say it does not shock the conscience there. The Court is probably going to form some objective test about the behavior of the officer under the circumstances.

PROFESSOR SCHWARTZ: Realistically, a court's conscience is very rarely shocked. It is a reality of these claims.